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IN THE

Supreme Court of the United States

OCTOBER TERM, 1922

OMNIA COMMERCIAL COMPANY, INC.,
Appellant,
vs.
THE UNITED STATES

No. 229

APPEAL FROM THE COURT OF CLAIMS

REPLY BRIEF FOR THE APPELLANT

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STATEMENT

Opposing counsel fail to recite in their statement of facts that appellant's petition alleged:

1. That the contract rights taken from the appellant were purchased for a substantial consideration actually paid by appellant's predecessors. This purchase gave to the appellant's rights a material, not imaginative, value.

2. That the appellant posted $2,300,000 in letters of credit for the performance of its contract; a circumstance greatly enhancing in value to the Government the rights taken.

3. That the Government after the initial taking continued to refuse to permit any deliveries to be made to the appellant under its contract with the Allegheny Steel Company

and continued to take the rights of the appellant under its contract until some time after November 11, 1918.

ARGUMENT

Opposing counsel contend (p. 2 Brief) that:

The complaint fails to state a cause of action, there being no allegation from which it can be determined that statutory authority existed for doing the things complained.

Four different contentions are made under this heading. We enumerate our replies.

I. In support of the argument that the complaint must allege the statutory authority of the agent of the government, opposing counsel's brief cites:

> *United States vs. North American, etc., Co., 253 U. S. 330; 64 L. ed. 935.*
>
> *Hooe vs. United States, 218 U. S. 322; 54 L. ed. 1055.*

The brief admits (p. 7) that these cases were not decided on a question of pleading. As a matter of fact, they were both decided on appeals from judgments of the Court of Claims rendered upon petition and traverse, the submission of evidence, argument by counsel thereon and a finding of facts.

The first case, *United States vs. North American, etc., Co.*, decided that: without the performance by the Secretary of War of the antecedent action prescribed by the statute, an army officer did not act within his authority, given by that statute, in appropriating for a military reservation land containing a placer mining claim. This opinion states the law upon which the present appellant has built its case and there is not one reference in the opinion to the contents of a petition or a single proper inference from the decision that

a claimant must present, *in his petition*, his evidence of authority for an agent's acts.

The case of *Hooe vs. United States, 218 U. S. 322, 54 L. ed. 1055*, is again a decision from a judgment from the Court of Claims rendered upon a petition, a traverse, evidence taken and a finding of facts. The claimants, in their evidence submitted, were unable to establish the authority of an executive officer to bind the United States and the claim was denied. Here again the opinion neither by direct reference nor by inference deals with the question of the contents of a petition.

These are both decisions of the substantive law; not adjective. The theory of the appellant's case is in full accord with them. All the appellant seeks is an opportunity to present its evidence establishing the authority of the Government and its agents. This it cannot do without the reversal of the judgment below.

Section 159 of the Judicial Code, which prescribes the content of petitions in the Court of Claims, directs no specification of the authority under which an agent of the government acts; neither do the rules of the Court of Claims. In fact, the Court of Claims, while strict in its requirements as to the pleading of jurisdictional facts, has refused to be bound by strict rules of pleading and has always inquired as to substance in preference to form.

> *U. S. vs. Burns, 12 Wall. 246, 254; 20 L. ed. 388, 390.*
> *Murray vs. U. S., 46 Ct. Cl. 91.*
> *Brown vs. District of Columbia, 17 Ct. Cl. 303.*
> *Morse Arms Mfg. Company's case, 16 Ct. Cl. 296.*
> *Pierce vs. United States, 1 Ct. Cl. 195.*

These established principles hardly should be departed from when the omission in the complaint alleged by coun-

sel's brief could work a hardship on no one. The authority of the official is, of necessity, a public record. Counsel could scarcely be surprised by the production at the trial of the evidence of the statutes. Surely the facts alleged in the complaint are sufficient, without the specification of statutes, to advise counsel what demands must be met. Subject to the rule that the proof must correspond with the allegations, the allegations of the complaint are in sufficient detail to give the Government the benefit of the principle of *res judicata*. These considerations indicate why the Court of Claims, in sustaining the demurrer, made no reference to the present contention of counsel.

This court has already denied that a declaration must set out the authority of an agent or even aver it.

> *Bank of the Metropolis vs. Guttschlick, 14 Peters, 19, 27; 10 L. ed. 335, 339.*

This court has likewise held that a general allegation of agency is sufficient, without an averment that the agent had authority to act in the premises. In fact, Mr. Justice Story has expressely said, in the case of a suit brought against a principal for a note made by this agent, that:

> "The note might have been declared on as the note of the principal, according to its legal operation, without noticing the agency; and though it would have been technically more accurate to have averred that the principal, by his agent, in that behalf duly authorized, made the note, yet it is not indispensable; for if he makes it by his agent, it is a necessary inference of law that the agent is authorized, for otherwise, the note would not be made by the principal; and that the demurrer itself admits."
>
> *Childress vs. Emory & McClear, 8 Wheat. 642, 670, 5 L. ed. 705, 712.*

[illegible] upon which this claim arose are described in the petition in thirteen instances as those of "the defendants" without reference to any agent. In two instances (Transcript of Record, p. 4, line 9 of the first paragraph beginning thereon and line 2 of the second paragraph beginning on the same page) the description is, "The defendants, through one of their agents for the purpose, one J. Leonard Replogle, Director of Steel Supply of the War Industries Board of the United States Government." It is common knowledge that the United States always act through agents. Therefore, when it is alleged that "the defendants" acted or failed to act, the very filing of the general demurrer admits, for the purpose of the demurrer, the authority of the agent. Where the agent is described as "one of their agents for the purpose," the demurrer admits that he is an agent for the purpose and counsel should not now be heard to argue that their demurrer was a denial of the allegation.

Thus, from the standpoint of the governing statute, the rules and the established principles of the Court of Claims, the decisions of this court on similar questions of pleading and from the result as a practical matter, the failure to allege in the complaint the specific authority of the agents of the United States does not give a basis for affirming the judgment sustaining the general demurrer.

II. In further support of its contention that the complaint fails to show the authority of Replogle, Director of Steel Supply of the War Industries Board, counsel (p. 4, Brief of United States) cite the authority under which they suppose Replogle acted.

In reply thereto we offer the following. The act of August 29, 1916, c. 418, Section 2, 39 Stat. 649, 1916 U. S. Comp. Stat., Sec. 3115a-d, provides for a Council of National Defense "for the coordination of industries and re-

sources for the national security and welfare" and to effect the "creation of relations which will render possible in time of need the immediate concentration and utilization of the resources of the nation." The Council is directed to adopt rules and regulations, which rules shall be subject to the approval of the President, for the conduct of its work. Power is given to organize subordinate bodies for its assistance.

The Secretaries of War and of the Navy, together with the Secretaries of Interior, Agriculture, Commerce and Labor were constituted members of this Council and approved its orders. (See Circular Number One of the War Industries Board, issued September 21, 1917.)

The War Industries Board was created July 28, 1917 (See Brief for the United States, p. 4), as a subordinate body of the Council. The War Industries Board under orders of the Secretary of War, Chairman of the Council, said orders being issued with the approval of the President, undertook the assigning of priorities in the manufacturing of steel products in the United States. (First Annual Report of the Council of National Defense, November 21, 1917, p. 117.)

On September 21, 1917, the War Industries Board issued a circular putting into written published effect the existing plan of priority directions to manufacturers. This publication was approved and signed by the Secretary of War and the Secretary of the Navy (See Circular Number One of the War Industries Board, September 21, 1917, and the First Annual Report of the War Industries Board, supra).

J. Leonard Replogle was a member of the War Industries Board (War Industries Board Circular No. 1, September 21, 1917).

The directions given by members of the Priorities Committee of the War Industries Board, under the Council Chairmanship of the Secretary of War, in accordance with

tions [illegible] approved by the President, were mandatory under the authority of the Act of June 3, 1916, c. 134, Sec. 120; 39 Stat. 213, 1916 U. S. Comp. Stat., Sec. 3115g;[1] also the act of March 4, 1917, c. 180, 39 Stat. 1192;[2] (substantially re-enacted July 1, 1918, c. 114; 40 Stat. 719;) and

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Note. "The President, in time of war or when war is imminent, is empowered, through the head of any department of the Government, in addition to the present authorized methods of purchase or procurement, to place an order with any individual, firm, association, company, corporation or organized manufacturing industry for such product or material as may be required, and which is of the nature and kind usually produced or capable of being produced by such individual, firm, company, association, corporation, or organized manufacturing industry.

Compliance with all such orders for products or material shall be obligatory on any individual, firm, association, company, corporation, or organized manufacturing industry or the responsible head or heads thereof and *shall take precedence over all other orders and contracts theretofore placed* with such individual, firm, company, association, corporation, or organized manufacturing industry. * * *" Act of June 3, 1916, c. 134, Sec. 120; 39 Stat. 213; 1916 U. S. Comp. Stat. 3115g.

[1] Note. "(b) That in time of war, or of national emergency arising prior to March 1, nineteen hundred and eighteen, to be determined by the President by proclamation, the President is hereby authorized and empowered, in addition to all other existing provisions of law;

First. Within the limits of the amounts appropriated therefor, to place an order with any person for such ships or war material as the necessities of the Government, to be determined by the President, may require and which are of the nature, kind, and quantity usually produced or capable of being produced by such person. Compliance with all such orders shall be obligatory on any person to whom such order is given, and such order shall take precedence over all other orders and contracts theretofore placed with such person. If any person owning, leasing, or operating any factory equipped for the building or production of ships or war material for the Navy shall refuse or fail to give to the United States such preference in the execution of such an order, or shall refuse to build, supply, furnish, or manufacture the kind, quantity, or quality of ships or war material so ordered at such reasonable price as shall be determined by the President, the President may take immediate possession of any factory of such person, or of any part thereof without taking possession of the entire factory, and may use the same at such times and in such manner as he may consider necessary or expedient.

Second. Within the limit of the amounts appropriated therefor, *to modify or cancel any existing contract for the building, production, or purchase of* ships or *war material;* and if any contractor shall refuse or fail to comply with the contract as so modified, the President may take immediate possession of any factory of such contractor, or any part thereof without taking possession of the entire factory, and may use the same at such times and in such manner as he may consider necessary or expedient.

Third. *To cause the owner* or occupier *of any factory in which ships or war material are built or produced to place at the disposal of the*

the act of June 15, 1917, c. 29, Sec. 1, 40 Stat. 182* (re-enacted with additions April 22, 1918, c. 2, and November 4, 1918, c. 201, 40 Stat. 1022).

United States the whole or any part of the output of such factory, and within the limit of the amounts appropriated therefor, to deliver such output or parts thereof in such quantities and at such times as may be specified in the order at such reasonable price as shall be determined by the President.

Fourth. To requisition and take over for use or operation by the Government any factory, or any part thereof without taking possession of the entire factory, whether the United States has or has not any contract with the owner or occupier of such factory.

* * * * * * * * *

(d) That whenever the United States shall cancel or modify any contract, make use of, assume, occupy, requisition, or take over any factory, or part thereof, or any ships or war material, in accordance with the provisions of paragraph (b) it shall make just compensation therefor to be determined by the President, and if the amount thereof so determined by the President is unsatisfactory to the person entitled to receive the same, such person shall be paid fifty per centum of the amount so determined by the President and shall be entitled to sue the United States to recover such further sum as added to said fifty per centum shall make up such amount as will be just compensation therefor in the manner provided for by section twenty-four, paragraph twenty, and section one hundred and forty-two of the Judicial Code." Act of March 4, 1917, c. 180; 39 Stat. 1192.

* NOTE.—"The President is hereby authorized and empowered, within the limits of the amounts herein authorized—

(a) To place an order with any person for such ships or material as the necessities of the Government, to be determined by the President, may require during the period of the war and which are of the nature, kind and quantity usually produced or capable of being produced by such person.

(b) *To modify, suspend, cancel, or requisition any existing or future contract for the building, production, or purchase of ships or material,* * * *

(c) *To require the owner or occupier of any plant in which ships or materials are built or produced to place at the disposal of the United States the whole or any part of the output of such plant, to deliver such output or part thereof in such quantity and at such times as may be specified in the order.*

(d) * * * to requisition and take over for use or operation by the United States any plant, or any part thereof without taking possession of the entire plant, whether the United States has or has not any contract or agreement with the owner or occupier of such plant.

* * * * * * * * * *

Compliance with all orders issued hereunder shall be obligatory on any person to whom such order is given, and such order shall take precedence over all other orders and contracts placed with such person. If any person owning any ship, charter, or material, or owning, leasing, or operating any plant equipped for the building or production

That Replogle's acts under such authority were sufficient to prohibit the performance by the Allegheny Steel Company of the appellant's contract there can be no doubt.

Roxford Knitting Co. vs. Moore & Tiernay, 263 Fed. 177. Writ of certiorari denied; 253 U. S. 498; 64 L. ed. 1031.

III. The brief of the opposing counsel (p. 6) states that the allegations in the complaint that: "the defendants ordered the Allegheny Steel Company to fill only such orders as would be given it by the defendants and to hold its plant production for the year 1918 at the complete and absolute disposal of the defendants;" and "the defendants, though well knowing and admitting the right, title and property of the plaintiff in its contract * * * throughout the year 1918, up to and including the eleventh day of November of that year and some time thereafter, continued to refuse to permit the said Allegheny Steel Company to fulfill its contract aforesaid with the plaintiff." are not intended to set

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of ships or material shall refuse or fail to comply therewith or to give to the United States such preference in the execution of such order, or shall refuse to build, supply, furnish, or manufacture the kind, quantities or qualities of the ships or material so ordered, at such reasonable price as shall be determined by the President, the President may take immediate possession of any ship, charter, material or plant of such person or any part thereof without taking possession of the entire plant, and may use the same at such times and in such manner as he may consider necessary or expedient.

Whenever the United States shall cancel, modify, suspend or requisition any contract, make use of, assume, occupy, requisition, acquire, or take over any plant or part thereof, or any ship, charter, or material in accordance with the provisions hereof, it shall make just compensation therefor to be determined by the President; and if the amount thereof, so determined by the President, is unsatisfactory to the person entitled to receive the same, such person shall be paid seventy-five per centum of the amount so determined by the President and shall be entitled to sue the United States to recover such further sum as, added to said seventy-five per centum will make up such amount as will be just compensation therefor, in the manner provided for by Section twenty-four, Paragraph twenty, and Section one hundred and forty-five of the Judicial Code." Act of June 15, 1917, c. 29, Sec. 1; 40 Stat. 182.

forth additional facts as constituting, separate and apart from everything else, an independent ground of recovery.

Counsel are mistaken. Contrary to their interpretation these allegations were intended to set forth additional facts (not legal conclusions) constituting ground for recovery. That these continuing acts of the defendants do constitute ground for recovery see the cases cited in Brief for the United States, pp. 3 and 7, i. e.

> *United States vs. North American, etc., Co. 253 U. S. 330; Portsmouth, etc., Co. vs. United States, decided, December 4, 1922.*

The authority for the alleged direction of the United States to the Allegheny Steel Company to fill only orders given it by the agents of the United States and not to fill the contract with the appellants rests not only upon the statutes and regulations heretofore cited, empowering J. Leonard Replogle to act, but upon the executive order of the President of March 4, 1918, directly defining the functions of the War Industries Board[1] and the Act of May 20, 1918, c. 78, Secs. 1 and 2, 40 Stat. 556; 1916 U. S. Comp. Stat (Suppl. 1919) Sec. 283a.

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[1] NOTE.—"* * * No. 5. The determination wherever necessary of priority of production and of delivery and of the proportion of any given article to be made immediately accessible to the several purchasing agencies when the supply of that article is insufficient either temporarily or permanently." Executive Order March 4, 1917. Second Annual Report of the Council of National Defense, 1918, p. 118.

[2] NOTE.—"(Act May 20, 1918, c. 78, 40 Stat. 556.)

SECTION 1. For the national security and defense, for the successful prosecution of the war, for the support and maintenance of the Army and Navy, for the better utilization of resources and industries, and for the more effective exercise and more efficient administration by the President of his powers as Commander in Chief of the land and naval forces the President is hereby authorized to make such redistribution of functions among executive agencies as he may deem necessary, including any functions, duties, and powers hitherto by law conferred upon any executive department, commission, bureau, agency, office or officer,

counsel declares the complaint is so drawn that it alleges no facts from which a contract may be implied. This contention is: that the refusal of the executive officers of the United States to pay compensation, constitutes a disavowal of any rights in the appellant which the Government was bound to respect and as a consequence there could be no basis for an implied contract.

It is submitted that the case of *Temple vs. United States, 248 U. S. 121; 63 L. ed. 162*, is not in point. That case was one where the claimant alleged that the Government, in dredging a submerged channel in the Chicago river, took the land of the claimant, a riparian owner. The answer specifically denied title in the claimant and asserted title in the Government for the purpose of improving navigation. The opinion comments repeatedly upon this denial of *title in the claimant*, declaring that in the face of such a contention, it was impossible to imply a contract in fact.

In the case at bar, the complaint states in three places that

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in such manner as in his judgment shall seem best fitted to carry out the purposes of this Act, and to this end is authorized to make such regulations and to issue such orders as he may deem necessary, which regulations and orders shall be in writing and shall be filed with the head of the department affected and constitute a public record: Provided, That this Act shall remain in force during the continuance of the present war and for six months after the termination of the war by the proclamation of the treaty of peace, or at such earlier time as the President may designate: Provided further, That the termination of this Act shall not affect any act done or any right or obligation accruing or accrued pursuant to this Act and during the time that this Act is in force: Provided further, That the authority by this Act granted shall be exercised only in matters relating to the conduct of the present war.

SEC. 2. In carrying out the purposes of this Act the President is authorized to utilize, coordinate, or consolidate any executive or administrative commissions, bureaus, agencies, offices, or officers now existing by law, to transfer any duties or powers from one existing department, commission, bureau, agency, office, or officer to another, to consolidate the personnel thereof or any part of it either by detail or assignment, together with the whole or any part of the records and public property belonging thereto." Act of May 20, 1918, c. 78, Sec. 1 and 2; 40 Stat. 556; 1916 U. S. Comp. Stat. (Suppl. 1919) Sec. 283a.

the defendants, though "well knowing and admitting the right, title and property of the plaintiff in its contract," committed the acts complained of. This is not a legal conclusion: it is an allegation of fact. If the general demurrer admitted anything it would seem to have admitted this allegation. It is elemental that a denial of this allegation should have been made by a traverse.

To infer a denial of title in the plaintiff as the only basis for a refusal to pay upon the part of the executive officers of the United States is wholly untenable. The amount asked for, the citizenship of the claimants, their counter obligations to the United States, and any other of a dozen or more reasons, might have influenced the executive officers of the United States to refuse payment. If the appellant's title is contested let the point be raised by traverse; not be admitted by demurrer and then debated.

In conclusion on the contention in the Brief for the United States that the demurrer was properly sustained because authority for defendants' acts was not specified therein, we submit that we have demonstrated that:

The cases cited by opposing counsel for the proposition that the petition must specify the statutory authority of the agents of the United States are decisions rendered upon petition and traverse, evidence submitted, arguments of counsel thereon, and a finding of facts; neither directly nor by inference do they express an opinion as to the necessity of specifying, in the petition, the agent's authority;

Neither the Judicial Code, the rules of the Court of Claims, nor the decisions of that court nor this, require any such specifications in the petition; indeed such a requirement is foreign to the pleading principles of the Court of Claims;

This court has held that a general allegation of agency is sufficient, without averment of the agent's authority;

The filing of the demurrer admits, for this purpose, the truth of the averment of authorized agency;

Counsel are mistaken as to the authority upon which the agents of the United States acted; their authority was complete;

The very cases cited by counsel in opposition are authorities for constituting an allegation of continued acts by the United States, an allegation of a taking;

The allegations in the petition directly affirm the admission by the United States of title in the appellant and thus lay the basis for a contract implied in fact.

The second principal contention of opposing counsel (Brief for the United States, p. 8) is that:

There was no taking of the appellant's property within the meaning of the Fifth Amendment.

We will answer the supporting arguments in turn.

I. Counsel declare that every contract is entered into subject to the possibility that the sovereign may render it unenforceable or impair its value and then cite four cases (Brief of the United States, p. 9) to the effect that the power of the sovereign to regulate cannot be impaired by the existence of prior contracts. These cases, in order of their citation, hold: that the power of Congress to regulate interstate commerce cannot be abridged by contracts made prior to the regulation; that the power of a state to regulate public service corporations cannot be abridged by such means; that neither the power of Congress nor the power of a state, existing in times of peculiar emergency to control housing, can be so abridged. Unfortunately these cases cast no light on the present question. They all arose as a result of the *challenge* of the authority to regulate; the appellant, in the case at bar, *affirms the authority* to appropriate. In the cases cited, the regulating power took to its own use nothing which the citizen had; in the case at bar the Government took to its own use the very essence of the rights of which the appellant was possessed. In the cases

cited the sovereign said, "You shall use your property thus." In our case the sovereign said, "You shall not use your property; your rights therein are appropriated for public use."

Of the next five cases cited by counsel, the *Legal Tender Cases (12 Wall 457)*, *C. B. & Q. Ry. vs. Drainage Com'r. (200 U. S. 561)* and *Atlantic Coast Line vs. Goldsboro (232 U. S. 548)* are further instances of regulation upon the same principle that the proper power to regulate shall not be abridged by contracts existing prior to the regulation. *Hamilton vs. Kentucky Distilleries Co. (251 U. S. 146)* and *Jacob Ruppert vs. Caffey (251 U. S. 264)* are two of the so-called "liquor" cases, where regulation of property forbids its eventual use but provides not only an opportunity for disposition of the property before its use becomes unlawful, but in no wise appropriates the rights in the property to the interdicting power.

In all the nine cases cited by the opposing counsel the courts, in upholding the power of regulation challenged, point out that the injuries complained of by the property holder are a mere consequence of the regulation of the manner in which he may use his property. The regulating power neither takes to itself the owner's property nor forbids his use of it in order that the sovereign may use it.

The case of *Morrisdale Coal Company vs. United States, decided May 29, 1922*, cited by opposing counsel (Brief for the United States, pp. 10, 11), is quite distinct from that at bar. There under statutory authority, we find the Government *regulating* the price at which coal should be distributed. Power to invalidate contracts in which prices had been fixed prior to the passage of the statute is not granted. The plaintiff did not allege the receipt of an unreasonable price under the Government order. The failure to make this allegation was an omission which barred the claim from relief within the statutory provisions. From this we may fairly assume

that the regulation of the Morrisdale Company's property in its contract included a reasonable compensation for those rights. In appellant's case its rights in its contract were not *regulated* by the Government; they were abrogated. In the case at bar the appellant was not advised that in view of the public interest it must exercise its rights within a certain price limitation; it was prevented from exercising them in any wise.

In the statute upon which the *Morrisdale* case was decided (Act of August 10, 1917, Chap. 53, Sec. 25, 40 Stat. 276, 284) Congress specifically excepted from its grant of power the regulation of prices so as to invalidate "any contract in which prices are fixed, made in good faith, prior to the establishment of and publication of maximum prices by the Commission." In the case at bar the President was given power, "to modify or cancel any existing contract for the building, production or purchase of ships or war material" and it was provided that, "whenever the United States shall cancel or modify any contract * * * it shall make just compensation therefor," Act of March 4, 1917, c. 180, 39 Stat. 1192. (See page 7 of this reply brief.) Again the President was empowered "To modify, suspend, cancel, or requisition any existing or future contract for the building, production or purchase of ships or material," and again it was provided that: "Whenever the United States shall cancel, modify, suspend or requisition any contract * * * it shall make just compensation therefor * * *," Act of June 15, 1917, c. 29, Sec. 1, 40 Stat. 182. (See p. 9 of this reply brief.)

It will be seen that in the Morrisdale case, Congress carefully forbade the modification, suspension or cancellation of existing fixed price contracts, whereas in the case of material for ships (the subject matter of the appellant's contract) authority was granted to destroy such contracts provided

just compensation was made. The appellant had such a contract; for the rights in that contract it paid a material, valuable consideration. All the appellant wants is to be paid for these rights which were taken as it is provided the appellant should be paid in the statutes enacted by reason of the restriction contained in the Fifth Amendment.

II. Counsel contend that (Brief for the United States, pp. 12-13) somewhat similar acts to those complained of here would not make a private individual liable for his actions to the appellant. Granting, for the argument, that the cases referred to are authorities for the propositions for which they are cited, we do not see how they are of any aid to the court in settling the issue now before it.

The question in this case at bar is whether the facts alleged in the petition come within the general principle that, if admitted private property is appropriated for the public use by properly authorized agents of the United States the owner of the property must be compensated. The cases between private parties cited by opposing counsel do not operate upon this principle at all. The courts there are led by the entirely different fundamental consideration of private relationships. Facts which are only roughly similar to those at bar are applied to standards entirely dissimilar. The result does not help. For this reason the appellant has refrained from quoting in its behalf decisions on the controversies between private parties where the results are different than in those cases cited by opposing counsel. With due consideration for the analogies inferred by counsel in those cases dealing with private relations we suggest that this court will be burdened rather than assisted if invited to make such an inquiry.

III. On page 10 of their brief opposing counsel cite eight cases for the general proposition that there was no taking within the constitutional sense. These cases will be commented upon and distinguished in oral argument.

IV. The contention is advanced by counsel that if the appellant is permitted to prevail on this appeal, that when the United States compulsorily inducts into military service a person bound by contract to render personal services to another for a term of years, the person to whom the services are owing must be compensated.

In the first place, even if this were true, we submit that the prospect of such a supposed ruling should constitute no reason why this appellant should be denied the justice to which the law entitles it. The small group of individual stockholders in the appellant corporation had rights measurable in terms of current market value. To obtain these they surrendered valuable property, tangible and intangible, worth upwards of three million dollars. This property the public need required to be destroyed and appropriated to the public use. There has been an injury, by which the rest of us benefited, suffered by these men. They can look nowhere for remedy but to our Government. That Government is obligated, in view of the existing decisions of this court, to compensate them regardless of what would be the outcome of a different case arising under different circumstances and different statutes.

If the case put by counsel should ever arise in this court, we suggest the application to it of the circumstances in the case at bar. First, it should be shown that the obligation to labor for a term of years arose as the result of a substantial and material consideration paid out; second, that the services promised be of such a character that there is no opportunity whatever to secure them elsewhere; third, that the product of the obligated individual's services be sold in advance to financially responsible parties. If these elements appear, then turn the case over to the Court of Claims for a determination, as a fact, of the extent of the claimant's injuries. If, in such a case, subject to the inherent infirmi-

ties of proving the value of a contract for personal services, the claimant can prove actual and not speculative injuries, then he should be compensated; for surely his property has been taken.

It is submitted that the control of the situation in the hypothetical case and indeed, in the case at bar, lies not in the denial of the logically demonstrated conclusion that the claimant's property was appropriated for public use, but in the award of damages for his actual injuries. Let the Court of Claims determine, subject to the highly restrictive doctrines of that Court, the extent of the injury sustained. Then, if in fact it be found that the United States has indeed injured its loyal citizens by its appropriation of their rights, let just compensation be made to them.

In summary of our reply to the contention that the appellant's property has not in fact been taken, we submit that:

(1) *The cases cited in the brief for the United States refer to regulation, not appropriation, by the sovereign;* (2) *the cases cited on remedies for injuries caused by private parties are but approximately analogous in fact and not at all in principle;* (3) *the hypothetical case supposed by consul, if limited by the facts in the case at bar and by its own infirmities, is properly controllable by the determination of the extent of compensation due and constitutes no bogey of precedent to prevent this court's allowing this appellant to introduce the evidence of its injury.*

It is respectfully submitted that the judgment should be reversed.

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